No. 391.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error.*

vs.

H. W. BAKER, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

HAROLD PRESTON,
E. M. CARR AND
L. C. GILMAN,
Attorneys for Defendant in Error.

SEATTLE, WASHINGTON.

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OBJECTION TO CONSIDERATION OF ERRORS ASSIGNED.

Comes now the defendant in error, H. W. Baker, and hereby objects to the consideration by the court of the alleged errors assigned herein by the plaintiff in error, for that

1. None of the alleged errors claimed and assigned by the plaintiff in error herein were properly taken, preserved or assigned in the Circuit Court of the United States for the District of Washington or in this court.

2. No proper, sufficient or legal bill of exceptions was certified by the Circuit Court of the United States

for the District of Washington, or by any judge thereof, and the record herein contains no proper, sufficient or legal bill of exceptions.

3. No proper, sufficient or legal assignment of errors was filed in said Circuit Court of the United States for the District of Washington, and no proper, legal or sufficient assignment of errors appears in the record herein.

These objections are based upon the record herein on file in this court.

HAROLD PRESTON,
E. M. CARR and
L. C. GILMAN,
Attorneys for Defendant in Error.

ARGUMENT ON OBJECTIONS.

I.

The only errors claimed to be assigned herein are based upon alleged exceptions taken by the plaintiff in error to instructions given by the court to the jury, and refusals by the court to give certain instructions asked by the plaintiff in error. (Printed Record, pp. 168-180.) None of these exceptions were properly taken, and therefore no error has been properly preserved, for the reason that all exceptions to instructions and refusals to instruct were taken after the court had concluded its charge to the jury, and *after the jury had retired to their room to deliberate upon their verdict.* This appears affirmatively from the bill of exceptions. (See Printed Record, p. 161.) Exceptions to instructions and refusals

to instruct thus taken are of no avail, and therefore none of the alleged errors assigned can be considered by this court. This question is settled not only by the decision of this court, but by repeated and uniform decisions of the Circuit Courts of Appeal of other circuits and of the Supreme Court of the United States.

Bank vs. McGraw, 76 Fed. 930-935; 22 C. C. A. 622.

It is true that there appears in the record an attempted excuse for thus taking the exceptions, in the form of a statement by the court that it refuses in all cases to allow exceptions to be taken in the presence of the jury; but it also appears that the plaintiff in error made no request of the court to be permitted to take its exceptions to the charge at the proper time or in the proper manner. Having made no effort to protect its rights in this respect, plaintiff in error certainly will not be permitted to complain in this case that the court in other cases has refused to allow exceptions to be properly taken and preserved. No good reason is shown for a departure from a rule which this court declared in *Bank vs. McGraw, supra*, to be "absolutely essential to the proper and intelligent administration of justice." We submit that this question alone disposes of the entire assignment of errors made by the plaintiff in error. There is before the court nothing for consideration but the pleadings, the sufficiency of which have never been questioned.

II.

The so-called bill of exceptions (which may be found in the Printed Record, pp. 24 to 161 inclusive) is so

utterly defective and insufficient in form that no error can be predicated upon any of the exceptions therein set forth. It opens with the statement that the case came on for trial; then follows a statement that certain witnesses were called and sworn, with a transcript of the testimony of each witness; the objections by counsel to the admission of evidence, the rulings of the court thereon, and exceptions taken by counsel thereto, a statement that the testimony closed, a transcript *in full* of the charge of the court, followed by the exceptions taken to instructions and refusals to instruct. It is nothing more nor less than a transcript of the stenographer's notes of the trial, and is without the orderly and systematic arrangement necessary in a proper and sufficient bill of exceptions. As before stated, the only error claimed is the act of the court in giving certain instructions and refusing other instructions requested by plaintiff in error. None of these exceptions taken to instructions or refusals to instruct are pointed by any evidence showing the applicability of such instructions. Should this court undertake to consider any particular assignment of error made and to determine whether any instruction given was improperly given, or instruction refused was improperly refused, it will find nothing in the assignment itself or in the exception upon which it is based as a guide from which the court can say whether the particular instruction given or refused was in any way germane to the evidence before the jury. In order to reach a determination as to the correctness of the action of the lower court as to any question raised by the bill of exceptions or assignment of errors, this court would be compelled for itself to search through the en-

tire record for that particular evidence to which the instruction under consideration is applicable. This the court will not do. A bill of exceptions identical in form with that in the case at bar was before the Circuit Court of Appeals of the Fifth Circuit, and that court said in the course of its opinion refusing to consider the assignments of error:

"It" (the bill of exceptions) "purports to embrace all of the testimony submitted by the parties. It all appears to be set out in the order of its introduction without any special local relation to any of the exceptions on which the eighty-seven assignments of error claim to repose. We will not tax our time and the patience of the reader by repeating the reasoning we have heretofore delivered on this subject. * * * * The document referred to cannot be taken as a bill of exceptions."

City vs. Baer, 66 Fed. 440-445; 13 C. C. A. 572.
Phosphate Co. vs. Cummer, 60 Fed. 873; 9 C. C. A. 279.
Improvement Co. vs. Frari, 58 Fed. 171; 7 C. C. A. 149.
The Francis Wright, 105 U. S. 381.
Lincoln vs. Claflin, 7 Wall. 132.

Should the court give consideration to the bill of exceptions in question it would take upon itself the burden of searching the record to find the evidence, if any there be, applying to each particular exception. We submit that this is the province of counsel, not of the court; and if counsel neglect to point exceptions with the necessary evidence, the court should ignore them.

The position which we contend the court should assume relative to such a bill of exceptions, is well stated by the Supreme Court of the District of Columbia as follows:

"The court will not regard itself under any obligation to search through a mass of testimony inserted in a bill of exceptions, with a large amount of irrelevant matter and formal statements, to ascertain what there is that bears upon some specified ruling of the trial judge."

Railroad Co. vs. Fitzgerald, (*D. C. App.*) *22 Wash. L. Rep. 217.*
Railroad Co. vs. Walker, *Id. 223.*

While the various exceptions relied upon by plaintiff in error are all embraced in one document termed a bill of exceptions, we submit that each exception really constitutes a bill of exceptions by itself; that each exception must stand alone and be considered upon the matter and that only contained in itself. It is possible that matter outside of the exception itself might be made a part of it by proper reference; but the court is not bound to look beyond the particular matter incorporated in the exception either directly or by proper refusal to determine whether or not it is well taken; and it has been established by repeated rulings of the national courts that every bill of exceptions must be considered as presenting a distinct and substantial case, and it is on the evidence stated in itself alone that the court is to decide; and when exception is taken to instructions of the court given or refused, such exception must be accompanied by a distinct statement of the testimony given or offered which raises the question to which the exceptions apply.

Insurance Co. vs. Raddin, 120 U. S. 183-195.
Jones vs. Buckell, 104 U. S. 554-556.
Worthington vs. Mason, 101 U. S. 149.
Dunlop vs. Munroe, 7 Cranch 242.

Considering, therefore, that each of these exceptions constitutes by itself a separate bill and must stand or fall by the matter contained therein, it is apparent that no one of the exceptions can be considered by the court, as there is no evidence incorporated therein, either directly or by proper reference, from which the court can determine whether the instruction complained of was proper to be given or refused; and the court can only determine the propriety of the instruction by itself examining the entire mass of testimony included in the bill of exceptions in the order of its introduction, and covering above one hundred pages of the printed record, and segregating therefrom, the evidence, if any, applicable to any particular instruction.

III.

The assignment of errors is as defective as the bill of exceptions in the particulars above enumerated. The sufficiency of such an assignment of errors has been twice before the Circuit Court of Appeals of the Fourth Circuit during the present year, and in each case that court has refused to consider errors so assigned.

Newman vs. Steel & Iron Co., 80 Fed. 228-234.
Surety Co. vs. Schwerin, 80 Fed. 638.

In the first case above cited the court says:

"So far as the assignments relate to instructions asked for and refused, they neither quote nor refer to

the evidence that shows the relevancy of the propositions of law propounded by such instructions, and we therefore presume that no such testimony was before the jury, in which event it is evident that the court below did not err in refusing to give them."

And in the later case the court says:

"We are unable to consider the point suggested by counsel for the plaintiff in error concerning the refusal of the court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full nor its substance referred to in the assignments of error."

A reference to the assignment of errors herein (pages 168 to 180 of the Printed Record) discloses that in no one of the assignments, based as all are upon instructions given and refused, is contained any allusion to the evidence, and the court will therefore presume that as to instructions given the court had the evidence before it making such instructions proper, and as to instructions refused there was no evidence upon which the court could base the instructions asked for. It should be noted in this connection that the rules of the Circuit Court of Appeals of the Fourth Circuit relative to bills of exceptions and assignments of error are identical with those of this court. (See Compiled Rules Circuit Court of Appeals, 78 Fed., pages XXXI, *et seq.;* Rules Fourth Circuit, 78 Fed., page LVI; Rules Ninth Circuit, 78 Fed., page CII.)

We therefore submit that none of the errors assigned can be considered by this court, that the same should be ignored and the judgment of the lower court affirmed.

IV.

We also submit for the consideration of the court that the brief filed by the plaintiff in error does not conform to rule 24 of this court. There is no specification of errors distinct and separate from the argument as is contemplated by that rule, but the specification of errors and argument are so intermingled as to render it impossible from the specification made to determine exactly what portion of the errors assigned are relied upon in this court. While the general statement is made in the brief that reliance is had upon all the errors specified, yet the portions of the charge specified as errors are not set out *totidem verbis* as required by the rule.

Without waiving the objections hereinbefore made to the consideration of the bill of exceptions, assignment of errors and brief, the defendant submits the following brief upon the merits:

STATEMENT OF THE CASE.

The statement of the case made in the brief of the plaintiff in error is in the main correct; but in order to enable the court to have a clearer understanding of the controversy, it should be supplemented by a fuller statement of the facts.

In the year 1891 the plaintiff with certain associates, doing business under the firm name of H. W. Baker & Co., were engaged in the business of general commission merchants and brokers at the city of Seattle. The members of the firm and their place of business were

well known to the local managers and employes of the plaintiff in error, by reason of the fact that the firm had dealt with the telegraph company extensively for two or three years prior to 1891. (Printed Record, pp. 28-124.) In September, 1891, H. W. Baker & Co. consigned to B. Singer & Co. at Sydney, Australia, the ship "W. H. Lincoln" with a cargo of about one million and a quarter feet of lumber, the cargo to be sold by Singer & Co. for the account of H. W. Baker & Co. Subsequent to the sailing of the ship and prior to her arrival at Sydney, Mr. Baker learned from market reports and otherwise that the lumber market in Australia was considerably depressed; that the price of lumber was falling, and that he was likely to suffer a loss on this consignment, and he was therefore anxious to sell at the earliest opportunity. On the first day of October, 1891, B. Singer & Co. sent the following cable message to H. W. Baker & Co.:

"To Baker, Seattle: Offered four pounds thousand cif. Advise accept. Market dull. No outlet."

This message was transmitted over the government lines from Sydney over various cable lines to Pothcurno, from Pothcurno to Penzance, England, and from Penzance to New York, and from New York to Seattle. The line over which the message came from Penzance to Seattle was operated entirely by the Western Union Telegraph Co. From Pothcurno to Penzance the line was operated jointly by the Western Union Telegraph Co. and the Eastern Telegraph Co. The plaintiff in error therefore had control of the message from the time it reached Pothcurno. At some time while the message was en route the address was changed from "Baker" to

"Barker," and was taken from the wires at Seattle "Barker" instead of "Baker," and was delivered by the employes of the plaintiff in error at the place of business of one Abram Barker residing at Seattle. At the time of the delivery said Barker was absent from the city. The telegram was placed in his desk, and when he returned on the 8th or 9th of October he opened the message and finding that it was not intended for him returned it to the telegraph company, who then delivered it to H. W. Baker & Co. The offer contained in the cablegram was an advantageous one, and considerably above the market price at the time the telegram was delivered to Baker. The market price at Sydney, as shown by the uncontradicted testimony, was £3 to £3 10s per thousand feet between the first of October, 1891, and the 9th of October, 1891, although B. Singer & Co. obtained one offer of £3 12s per thousand. An advantageous sale was therefore lost by the firm of H. W. Baker & Co. by the misdirection and misdelivery of this cablegram, as the market price continued to fall, and the lumber was finally sold for barely enough to pay expense. Subsequent to the occurrence above narrated the firm of H. W. Baker & Co. dissolved, and Mr. Baker alone succeeded to the interest of the other partners, and this action was brought by Mr. Baker to recover the damages suffered by the negligence of the telegraph company in transmitting the message incorrectly. The verdict appears to be for the difference between £4 per thousand and £3 12s per thousand, the highest offer received subsequent to the delivery of the telegram, with interest added.

POINTS AND AUTHORITIES.

I.

It is claimed by the plaintiff in error that the court erred in its charge to the jury in its classification of the action in question, in that he told the jury that the action was founded in tort. Assuming that the court was in error in so classifying the action, it is difficult to see how such error could have been in any way prejudicial, so long as the facts upon which the action was based were sufficient to entitle the plaintiff to a recovery. The jury could not be concerned in a matter of mere definition or classification. This action being at law, the pleadings and practice in the Federal Court conform to the local practice, and in the State of Washington there are no classes of actions. The law of that state makes no distinction between actions *ex delicto* and actions *ex contractu* so far as the form of action is concerned. The state statute provides: "There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." (*2 Hill's Statutes & Codes of Washington, Sec. 109.*) It follows from this statute that it could make no difference in the rights of the parties whether the action be denominated as an action *ex delicto* or an action *ex contractu*. In either case the pleadings would take the same form and the evidence to support the pleadings would be identical.

We submit that the court placed this action in its proper class. The learned counsel for plaintiff in error

seems not to recognize the distinction between actions brought by the sender of a message and those brought by the receiver. Between the telegraph company and the former there exists a contract; between the company and the latter there is no contractual relation. The telegraph company owes to the receiver the duty of correct transmission and prompt delivery. A violation of this duty constitutes a tort. Mr. Thompson in his work on the Law of Electricity thus states the rule:

"If the action is brought by the *receiver* of the message it must be in *tort*, since there is no contract relation between him and the sender."

Thompson on Law of Electricity, Sec. 448.

See also—

Telegraph Co. vs. DuBois, 128 Ill. 248; 21 N. E. 4.
Telegraph Co. vs. Richman, 8 Atl. Rep. 172 (Pa.).
Telegraph Co. vs. Drybug, 35 Pa. St. 298.

A reference to paragraph eight of the complaint (Page 10 of the Printed Record) shows that the same contains apt allegations of negligence. It is claimed that the action is based on the contract set out in the record at page 191. Obviously this message cannot be the contract, as it is not the writing delivered by the sender to the telegraph company at Sydney or that received by the receiver at Seattle; it is simply a transcription of what was taken by the operator off the wires at Penzance and filed in the office of the company there. The action of the operator in taking it from the wires and in filing it was entirely disconnected with any act of either the receiver or the sender.

The Primrose case is not in point, as in that case the action was by the sender of the message, and it cannot be disputed that in all cases the relation between the sender and the company is a contractual one. In this case the Supreme Court in its opinion at page 21 hold that there is no contract between the receiver of the message and the company, as the court there says:

"Some of them were actions brought not by the sender but by the receiver of the message, who had no notice of the printed conditions until after he received it, and could not, therefore, have agreed to them in advance."

That the Supreme Court in the Primrose case holds that there is a contract between the sender and the company by which both parties are bound, and that the terms of this contract are to be gathered from the message itself, cannot be doubted. It is also equally clear from the opinion that the sendee is no party to this contract. From this it would seem to follow that his action sounds in tort, and that the instruction of the court below is correct.

That the person to whom a telegram is sent has a right of action against the company for mistransmission or failure to deliver, is well settled.

Mentzer vs. Telegraph Co., 93 Iowa, 752; 48 Am. & Eng. Corp. Cas. 390.

Milliken vs. Telegraph Co., 110 N. Y. 403; 18 N. E. 251.

Telegraph Co. vs. Beringer, 84 Texas, 38; 19 S. W. 336.

Young vs. Telegraph Co., 107 N. C. 370; 3 Am. Ry. & Corp. Cas. 494.

Telegraph Co. vs. Allen, *66 Miss. 549; 25 Am. & Eng. Corp. Cas. 536.*
Thompson on the Law of Electricity, *Sec. 428.*

While in England it has been held that the addresse of a message has no right of action against the company, yet such right of action has been sustained by all American courts before which that question has come.

II.

The rule laid down by the Circuit Court in its charge to the jury as to the degree of care required of a telegraph company in the transmission and delivery of messages does not place any too great responsibility upon the company. It is practically the same rule announced by Judge Gilbert of this court at circuit in the case of

Fleischner vs. Telegraph Co., *55 Fed. 738*,

as follows:

"The weight of modern authority supports the rule that while telegraph companies are not to be held as common carriers, and therefore insurers of the safe and timely transmission of messages, yet that their obligations are to some extent analogous to those of common carriers, having their source in the public nature of the employment, the public rights conferred upon them, and the business and social necessity of the service rendered. They are therefore held to the exercise of care, the degree of which is variously expressed, but is generally declared to be in substance such care and caution as is reasonably within their power to employ. That rule has been adopted in this court in *Abraham*

vs. Telegraph Co., 23 Fed. Rep. 315, where Judge Deady held that a telegrapher is 'bound to the exercise of care and diligence adequate to the discharge of the duties thereof.'"

The idea expressed by Judges Gilbert and Deady seems to be this: That the care must be commensurate with the importance of the business the telegrapher is called upon to transact; and considering the class and importance of the business transacted by wire, it is not too much to say that a high degree of care should be exercised. Certainly it "is reasonably within their power to employ" a high degree of care.

The Fleischner case was affirmed on appeal by this court in 66 Fed. 899; 14 C. C. A., 166.

The learned counsel for the plaintiff in error claims that the court should have charged the jury that the company was bound to exercise only ordinary care. But we submit that what constitutes ordinary care is a relative question depending upon the subject matter concerning which the care is to be exercised. What would be ordinary and reasonable care in a matter of small moment might be gross carelessness in a matter of grave import. And considering the importance to the public of the correct transmission and prompt delivery of telegraphic messages, it is not too much to say that ordinary care on the part of telegraph companies must be a high degree of care, and that it is reasonably within the power of such companies to employ this degree of care. And while some of the cases may use the expression "ordinary care," the meaning of this term when used in connection with this class of busi-

ness does not differ from that used by the trial court in its charge—a "high degree of care."

The meaning of this term is well stated in Thompson on the Law of Electricity, Sec. 140:

"The degree of care which telegraph companies are bound to bestow upon the performance of their duties is variously stated. It is sometimes said that they ought to use 'a high, perhaps the very highest degree of care and diligence in their operation,' or 'exact diligence.' Other courts are satisfied with 'ordinary care and vigilance,' or 'due and reasonable care,' as stated by Bigelow, J., in an important case. Perhaps there is little if any difference in these terms as applied to cases under discussion. They all undoubtedly mean that these corporations shall use a degree of care proportionate to the hazards and possibilities of mistake in their business. As the transmission of dispatches is a most delicate operation in many particulars, ordinary diligence in the operation and management of telegraph lines would demand a degree of attention from the agents of the companies fairly denominated extraordinary when applied to other concerns of life."

A well-considered Maine case thus defines the meaning of "ordinary care" when applied to the transmission of intelligence by electricity:

"The degree of care which these companies are bound to use is to be measured with reference to the kind of business in which they are engaged. As compared with many other kinds of business, the care required of them might be called 'great care.' While meaning really the same, it is variously stated by different courts

in the decisions to which we have referred,—'due and reasonable care;' 'ordinary care and vigilance;' 'reasonable and proper care;' 'reasonable degree of care and diligence;' 'care and diligence adequate to the business which they undertake;' 'with skill, with care, and with attention;' 'a high degree of responsibility.' These are but the varied forms of expressing the requirement of what is known in law as ordinary care, as applied to an employment of this nature,—an employment which is not that of an ordinary bailee. The public, as a general rule, have no choice in the selection of the company. They have none in the selection of its servants or agent. * * * And while we do not hold that these companies are common carriers and subject to the same severe rule of responsibility, we think that those who engage in the business of thus serving the public by transmitting messages should be held to a high degree of diligence, skill and care. * * * "

Fowler vs. Telegraph Co., 80 Me., 381; 15 Atl., 29.

In discussing this same question in an earlier case the Maine court says:

"To require a degree of care and skill commensurate with the importance of the trust reposed is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule."

Bartlett vs. Telegraph Co., 62 Me. 221.

It is thus seen that the terms "high degree of care," and "ordinary care" when considered in connection

with the subject-matter of this action are synonymous; that ordinary care for a telegraph company is a high degree of care. To say that the company is required to use a high degree of care is only another way of saying that it is bound to use ordinary care, and there was no error in the instruction given.

Telegraph Co. vs. Carew, 15 Mich. 524-533.
Tyler vs. Telegraph Co., 60 Ill. 421, 428-9.
Telegraph Co. vs. Dryburg, 35 Pa. St. 298-302.

III.

We now come to a consideration of the charge of the court as to presumption and the burden of proof; and the principle announced by the court as to where the burden rested is not only amply sustained by authority, but no authority can be found to the contrary.

In an action of this character it is only necessary for the plaintiff to show that the message was delivered to the company in one form and delivered by the company to the addressee in another form. This makes a *prima facie* case of negligence against the company, and throws upon it the burden of proof to show that it was not negligent. This rule is settled by the decisionof this court in *Telegraph vs. Cook, 61 Fed. 624-630; 9 C. C. A. 680*, in which the court says:

"The delivery of the telegram in its altered form threw the burden of proof on the company to show that it was not guilty of wilful misconduct or gross negligence in sending and delivering it in order to exonerate it from the damages actually sustained by the plaintiffs. Proof of the delivery of the telegram in its altered form

threw upon the company the burden of showing that it had exercised the degree of care and diligence required of it by the law under which it was operating; that is to say, great care and diligence."

Tyler vs. Telegraph Co., 60 Ill., 421.
Ayer vs. Telegraph Co., 79 Me., 493; 10 Atl., 495.
Bartlett vs. Telegraph Co., 62 Me., 209.
Reed vs. Telegraph Co., 37 S. W. Rep., 904.
Telegraph Co. vs. Griswold, 37 Ohio St., 313.
Telegraph Co. vs. Crall, 38 Kansas, 679; 17 Pac. 309.
Turner vs. Telegraph Co. 41 Iowa, 462.
Telegraph Co. vs. Harper, 39 S. W. Rep. 599.
Telegraph Co. vs. Tyler, 74 Ill., 168.
Rittenhouse vs. Telegraph Co., 44 N. Y., 263.
Telegraph Co. vs. Carew, 15 Mich., 533.
Pearsall vs. Telegraph Co., 124 N. Y., 256; 26 N. E. Rep., 534.
Telegraph Co. vs. Meek, 49 Ind., 53.

But it is argued that the instruction in question is erroneous in that it assumes it to have been shown by competent testimony that the message was properly delivered to the defendant company, and this brings into the discussion the responsibility of a telegraph company where it received the message, as in this instance, over connecting lines. In such a case it is not the duty of plaintiff, as suggested by counsel, to prove on which line the mistake complained of occurred. The law is that where there is a mistake in the delivery of a message which the company delivering the same received from a connecting line, it is presumed, in the

absence of evidence to the contrary, that it was correctly delivered by the connecting line, and that the error happened through the negligence of the company delivering the telegram.

Turner vs. Hawkeye Telegraph Co., 41 Iowa, 458.
La Grange vs. Telegraph Co., 25 La. Ann., 383.
Telegraph Co. vs. Howell, 95 Ga., 194; 22 S. E., 286.
Thompson on the Law of Electricity, Sec. 266.
25 Am. & Eng. Enc. of Law, page 823.

It was established by the testimony of Hamburger (Record, page 63) that the message when deposited in the telegraph office at Sydney was properly addressed "Baker." This testimony is uncontradicted. It is a conceded fact in the case that the message when it left the office of the Western Union at Seattle was erroneously addressed "Barker." The law, therefore, makes it the duty of the Western Union to show that the error did not occur on its line. The reason for the rule is obvious. All information as to where the mistake occurred is in the possession of the companies over whose lines the telegram was transmitted. The employe responsible for the mistake is necessarily under the control of one or the other of these companies. Neither the sender nor the sendee of the dispatch has or cna obtain any information as to who committed the mistake. It is easy for the defendant, who has every facility for determining whether or not the mistake was made on its line, to exculpate itself if it is innocent. To require the injured party to establish the particular act of negligence or ferret out the particular locality

where the negligent act occurred, after showing the mistake itself, would be to require in many cases an impossibility and enable the company to evade a just liability.

This has long been the settled rule in cases of the misdelivery or non-delivery of goods shipped over the connecting lines of common carriers.

Hutchinson on Carriers, Sections 104-721.
Laughlin vs. Ry. Co., 28 Wis., 209.
Smith vs. Ry. Co., 43 Barb., 225; Affirmed, 41 N. Y., 620.
Lin vs. Ry. Co., 10 Mo. App., 125.
Faison vs. Ry. Co., 69 Miss., 569; 13 So. Rep., 37.
Forrester vs. Ry. Co., 92 Ga., 699; 19 S. E., 811.
Beard vs. Ry. Co., 79 Iowa, 518; 44 N. W., 800.
Shriver vs. Ry. Co., 24 Minn., 506.
Dixon vs. Ry. Co., 74 N. C., 538.
Leo vs. Ry. Co., 30 Minn., 438; 15 N. W. Rep., 872.

The same reason exists for the presumption and the same rule has frequently been applied in the case of connecting lines of telegraph companies.

Telegraph Co. vs. Howell, supra.
Smith vs. Telegraph Co., 84 Texas, 359; 19 S. W., 44.
Telegraph Co. vs. Griswold, supra.
Turner vs. Telegraph Co., supra.

The court was therefore right in instructing the jury that the law presumed the defendant to be negligent until it could show to the contrary.

But it is claimed that the defendant did so show by the testimony of O'Leary, Mockbridge and Chambers, and that the court erred in its instruction to the jury as to the character and value of the testimony of these witnesses.

The argument of counsel for plaintiff in error seems to assume that the written message on file at Penzance itself came over the wire. It is a matter of common as well as of judicial knowledge that the transcription of the telegraphic signs which convey intelligence to the operator does not have any verity. That a message is written in a certain way by an operator is no proof that it came over the wires in that form. The only competent proof as to the intelligence transmitted by the usual telegraphic signs would be the testimony of the operator taking the message from the wires. The defendant in this case, instead of calling the operators at Penzance called G. R. Mockbridge, the superintendent (Record, page 77), and Chambers, manager (Record, page 92). To prove what came over the wires at New York the defendant called O'Leary (Record, page 102), the chief clerk of the cable message bureau at New York. O'Leary testifies on cross-examination that operator Delano received and operator Locke transmitted the message in question (Record, page 107). By the stipulation under which these depositions were taken (Record, page 199) the interrogatories were not settled, but either party had the right to object at the trial to the competency, relevancy or materiality of any interrogatory. When it appeared from the depositions of these witnesses that neither had shown that he was the person taking the message from the wires, and that

each was testifying solely with reference to the fact that a writing containing certain matter was on file in the office, it was entirely competent and proper that the court should confine the evidence to what was intended by these witnesses, viz: that they found a certain record in the office under their charge. Neither of them pretended in his evidence to state what was actually taken from the wires. If the operator at Penzance incorrectly transcribed the telegraphic signals indicating the word "Baker" as "Barker," of course the message on file would appear to be addressed to Barker. If anything, the court went too far in giving any effect whatever to these written messages. While the witnesses refer to these writings as "original messages," we do not presume it will be contended for a moment that they came over the wire in the form in which they were filed. The evidence of these witnesses not only does not establish that the defendant was free from negligence, but to our mind the exhibits attached to such depositions establish that the defendant was guilty of negligence, and that the mistake resulting in the change of this address from Baker to Barker occurred in the defendant's office at Penzance. We refer to the service messages which may be found at pages 193, 195 and 197 of the Printed Record. While these messages contain many abbreviations, we think they are clearly intelligible. They were exchanged between the employes of the company for the purpose of tracing the message which is the subject of this controversy. When Barker returned the telegram to the Seattle office that office sent to the Penzance office the service message appearing on page 195 of the Record, which is as follows:

"frm N Y for Seattle Wn Y 1st Barker Seattle and unk retd by Barker first Natl bank not for him W A C"

Clearly the import of this message is this: Your telegram of the first from New York for Seattle addressed to Barker has been returned by Barker of the First National Bank and is not for him. The Penzance office then sent a dispatch to Pothcurno and received from Pothcurno the dispatch appearing on page 197 of the Record, which is as follows:

"frm East on 7-1 is to Baker Seattle pse say if still undeld East P"

The clear import of this message is: Our telegram No. 7 of the first is to Baker, Seattle. Please say if still undelivered. To this message the following response was sent from Seattle:

"frm Seattle Wn 7 1st Baker Seattle deld"

Which being interpreted means: The Seattle office reports that your telegram No. 7 of the first to Baker, Seattle, has been delivered. These exchanges between the employes of the company shows that when Barker returned the message the Seattle office notified the Penzance office that the telegram had been returned and that they did not know to whom it should be delivered; that the Penzance office immediately communicated with the Pothcurno office, receiving the response that the telegram as originally sent by that office was to Baker and not to Barker. We submit that the error is clearly located in the Penzance office, which is concededly under the control of the defendant; that the receiving operator at Penzance either incorrectly understood the telegraphic signals or incorrectly transcribed them. We

call attention to the testimony of Mockbridge (pages 83 and 84), showing this interchange of service messages. It further appears from the testimony of Mockbridge (page 81) and the testimony of Chambers (page 93) that the line between Pothcurno and Penzance was operated jointly by the Western Union Telegraph Company and the Eastern Telegraph Company. It is fair to assume that the messages to go over the lines of the Western Union are taken charge of by that company at Pothcurno; yet in this case that company makes no attempt to trace the message back of Penzance. And while we rely upon the presumption of law hereinbefore discussed, without such reliance the recovery in this case could be sustained by the testimony of these witnesses alone.

IV.

The position taken in the brief of plaintiff in error that Mr. Baker's failure to register a cable address constituted contributory negligence on his part is utterly untenable when viewed in the light of the facts in this case. The delay in delivery and the consequent damage resulted wholly from the change of address in transmission. When the office in Seattle discovered that the correct address was Baker they made an immediate delivery. It is difficult for the ordinary mind to comprehend how registration of an address would in any way conduce to the correct transmission of a message. It is only intended to be in aid of prompt delivery after a message has been correctly transmitted.

V.

Plaintiff in error claims that the court erred in charg-

ing the jury that there was a presumption that the message was started right. It appears from the evidence that a message properly written and addressed was deposited in a telegraph office at Sydney. We do not think there is any error in presuming that in such case the operator there did his duty and "started the message right," especially in view of the fact that when the Penzance office asked the Pothcurno office concerning this message the latter office responded that the message it had sent was addressed to Baker.

VI.

Referring to the portion of the charge complained of in the eighth paragraph of the brief of plaintiff in error, we submit that this portion of the charge taken in connection with the context was as favorable as the company had a right to expect. (See page 141 Record.) The effect of the court's charge on this question is that had the telegram been intended for Barker the delivery to Mr. Mackintosh would have been sufficient.

VII.

Referring to the claim of error made in the ninth paragraph of the brief of plaintiff in error, it is enough to say that we have already pointed out to the court the evidence in the record showing that the mistake was made in the Penzance office.

VIII.

The tenth paragraph of the brief of plaintiff in error is in effect a commendation of the instruction of the court set forth therein.

IX.

The specifications of error made in the eleventh, twelfth and thirteenth paragraphs of the brief of plaintiff in error have been already discussed.

X.

In the fourteenth and fifteenth paragraphs of the brief of plaintiff in error an attempt is made to discuss rulings of the court admitting certain evidence. We cannot conceive upon what theory this matter is discussed, inasmuch as no error was assigned on the ruling of the court in these particulars; the only errors assigned being as to instructions given and refused. It is certainly unnecessary to more than state the proposition that counsel in their brief are limited to the discussion of errors assigned in the assignment of errors. (See Assignment of Errors, Record, pages 168-180.)

XI.

The instruction requested by the defendant and set out in paragraph sixteen of the brief of plaintiff in error was properly refused. Certainly the court would not have been justified in charging the jury that there was nothing on the face of the telegram indicating that it was intended for Mr. Baker; that is to say, upon the face of the telegram as sent. It clearly did indicate that it was intended for Mr. Baker, for as soon as the office at Seattle ascertained that the address was Baker it was immediately delivered to the party for whom it was intended. We again call the court's attention to the fact that the whole delay occurred from the change in address. Nor could the court consistently charge the jury

that this telegram did not indicate on its face the transaction that it referred to. Seattle, and the whole of Puget Sound in fact, is well known to the entire business world as engaging extensively in exporting lumber. Australia is a well known market for lumber. A telegram from Australia to Seattle making an offer of so much per thousand would be understood by any person of ordinary intelligence as an offer for lumber. In any event, this telegram plainly indicated to the defendant that it was an offer to purchase property of some kind. It could reasonably infer that a failure to properly transmit and deliver it would result in the loss of a sale, and necessarily the parties must have contemplated that in case of such loss of sale damages might result. The defendant must have known and must have contemplated that if it failed in its duty to properly transmit and deliver this telegram a sale would be lost, and that in that event they would be liable for the actual loss based upon charges in the value of the property.

The message itself clearly indicates that a sale could be had of certain property; it indicates further that the sale is an advantageous one, as the sender advises acceptance; it also indicates that if the offer is not accepted there will be a loss, for it states that the market is dull and that there is no outlet for the particular product. The telegraph company knew from the terms of the message itself that an advantageous offer would be lost in case the message was not promptly delivered.

The case of *Hadley vs. Baxendale* is not in point, as the damages there claimed were indirect and remote, not direct and consequential.

The facts in *Telegraph Company vs. Hall, 124 U. S.*, are entirely different from those in the case before the court. In that case the plaintiff owned no property. By the message he authorized the purchase of certain property in case the judgment of another person so dictated. *If* such property had been bought and *if* it had been sold on the next day a certain profit would have resulted; but the damages were purely speculative, as it could not be determined whether the property would have been bought or if bought whether it would have been sold on the next day. The discussion in the Hall case on the measure of damages is, however, in point and of interest, and we call attention to the opinion of Justice Mathews, page 456 *et seq.*, and to the cases there cited and reviewed; and we submit that the charge of the circuit judge in the case at bar was directly in line with the law as laid down by Justice Matthews.

But it seems to us that this question is settled by two decisions of this court:

Fleischer vs. Telegraph Co., 55 Fed. 738; affirmed *66 Fed. 899; 14 C. C. A. 166.*

Telegraph Co. vs. Cook, 61 Fed. 624; 9 C. C. A. 624.

In the first of these cases the attorneys for the plaintiff wired attorneys in Seattle, simply requesting the protection of a claim. The message was delayed in transmission. It was shown by evidence that had the Seattle attorneys received the message they would have attached the property of the debtor and would have made the amount of the claim. The court holds the loss resulting from the failure to attach as being within the contemplation of the parties.

In the Cook case the plaintiff instructed his agent, who was engaged in the purchase of fruit for his account at a distance, to buy no more pears. In transmission the word "pears" was changed to "peaches," and the agent continued to buy pears, thus causing the plaintiff a loss. This was also held to be within the reasonable contemplation of the parties.

We submit that there is no error in the record, and that the judgment of the Circuit Court should be affirmed.

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